



**Mirambo & another v Independent Electoral and Boundaries Commission
& another; Smartmatic International Holdings BV & another (Interested
Parties) (Constitutional Petition E488 & E465 of 2021 (Consolidated))
[2022] KEHC 11763 (KLR) (Constitutional and Human Rights) (16 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E488 & E465 OF 2021 (CONSOLIDATED)**

AC MRIMA, J

MAY 16, 2022

BETWEEN

STEPHEN MOSETO MIRAMBO PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

AND

SMARTMATIC INTERNATIONAL HOLDINGS BV INTERESTED PARTY

INFORM LYKOS (HELLAS) SA INTERESTED PARTY

**AS CONSOLIDATED WITH
CONSTITUTIONAL PETITION E465 OF 2021**

BETWEEN

BOAZ ATANGA WARUGU PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION RESPONDENT**

AND



SMARTMATIC INTERNATIONAL HOLDINGS BV INTERESTED PARTY
INFORM LYKOS (HELLAS) SA INTERESTED PARTY

JUDGMENT

Introduction:

1. The process of facilitating general elections imposes upon the Independent Electoral and Boundaries Commission (hereinafter ‘the IEBC’ or ‘the Commission’ or ‘the 1st respondent’), heavy procurement undertakings.
2. Inevitably, due to the high-stake nature of the attendant procurement, the processes in most cases yield to legal hurdles, both constitutional and statutory, among tendering entities. These petitions are one like disputes.
3. There are two petitions in this matter. They are petition No E488 of 2021 Stephen Moseti Mirambo v Independent Electoral and Boundaries Commission & Hon Attorney General and Smartmatic International Holdings BV (interested party) and Petition No E465 of 2021 Boaz Atanga Waruku v Independent Electoral and Boundaries Commission and Smartmatic International Holdings BV and Inform Lykos (Hellas) SA (interested parties).
4. The petitions were consolidated by an order of court and Petition No E488 of 2021 became the lead petition. The parties now appear in the consolidated petitions as in the above title. I will hereinafter refer to the two petitions as ‘the consolidated petitions’.
5. The consolidated petitions are opposed.

The 1st Petitioner’s Case:

6. The 1st petitioner, Stephen Moseto Mirambo’s, petition is dated November 15, 2021. It is supported by the petitioner’s affidavit deposed to on an even date.
7. He is aggrieved that the award of tender No IEBC/OIT/001/21/2020/2021 for supply, installation, testing and maintenance of the Kenya Integrated Elections Management System (KIEMS); and hardware equipment and accessories, (hereinafter referred to as ‘the Kiems tender’) to Smartmatic International Holding BV, (The 1st interested party herein) was in violation of the Constitution and the Public Procurement and Asset Disposal Act, No 33 of 2015 (hereinafter referred to as ‘the Procurement Act’) as well as the Regulations thereunder.
8. Essentially, his grievance is two-pronged. It is his case that Kiems tender was constitutionally and statutorily infirm for failing to provide for preference margins in favour of local and/or citizen contractors and for failing to make it a requirement that foreign tenderers source forty percent (40%) of their supplies from Kenyan citizens and local contractors before submitting their tenders.
9. He pleaded that the foregoing omissions by the IEBC was in violation of section 70 (6)(e)(vi), 70 (1) (g) and 89 (f) and 153(3)(4) & (5) and 155 of the Procurement Act and the Regulations therein.
10. In giving a historical account of the flawed tendering process, the 1st petitioner pleaded that in Public Procurement Administrative Review Board App No 107 of 2021, Risk Africa Innovatis Limited v The Accounting Officer, Independent Electoral & Boundaries Commission and another, (hereinafter referred to as ‘Review No 107 of 2021’), IEBC was ordered to cancel and re-advertise a fresh tender.



11. It was the petitioner's case that upon cancellation of the tender, the 1st interested party was aggrieved. It instituted Nairobi High Court Judicial Review Misc Application No E134 of 2021 Smartmatic International Holding BV v Independent Electoral and Boundaries Commission & 2 others (hereinafter referred to as 'the Judicial review case') seeking a reinstatement of the cancelled tender.
12. Upon being heard, the 1st petitioner contended that the judicial review case was determined on the basis that the Public Procurement Administrative Review Board (hereinafter referred to as 'the Review Board') misapprehended the term candidate as used in the *Procurement Act*. It thus quashed the decision of the Review Board.
13. The petitioners posited that subsequently, the IEBC re-advertised the tender. That aggrieved the 1st interested party herein who challenged the re-advertisement before the Review Board through PPARB Application No 117 of 2021 (hereinafter referred to as 'Review No 117 of 2021').
14. The petitioner pleaded that the Review Board struck out the request for review on the grounds that it lacked jurisdiction. He posited that despite cancelling the initial tender, the Commission subsequently still re-awarded the tender to the 1st interested party, the very tenderer it had cancelled the initial tender.
15. As a result of the foregoing, the petitioners pleaded that IEBC refused, failed, and or neglected to conduct public participation and engage all stakeholders relevant in the process of obtaining an election management system.
16. It was their case that the process leading to the award of the tender to the 1st interested party was unfair, inequitable and in violation of the petitioner's rights to a free and fair election that is accountable, transparent and verifiable in accordance with articles 81 and 86 of the *Constitution*.
17. They posited that under section 70 of the *Procurement Act* it is a requirement that standard tender document does set out, where necessary, the preferences and reservations of the tender and that they are clearly spelt out in the bidding documents.
18. The petitioner posited that they are apprehensive that the IEBC has not addressed the data management and transmission problems that led to nullification of the 2017 first presidential election hence the need for this court's intervention.
19. On the foregoing, the 1st petitioner prayed for the following orders:
 - a. A declaration that the tendering process for the entire tender proceeding No IEBC / OIT/001/21/2020/2021 and No IEBC/OIT/001/21/2021/2022 dated April 14, 2021 and September 22, 2021 respectively for the supply, delivery, installation, testing, commissioning, support and maintenance of the Kenya Integrated Elections Management System (KIEMS); and hardware equipment and accessories by the 1st respondent is unconstitutional, unlawful and irregular for being in breach of articles 10, 81, 86 and 227 of the *Constitution* and the public procurement and elections laws made thereunder.
 - b. A nullification of the entire tender proceeding No IEBC /OIT/001/21/2020/2021 and No IEBC/OIT/001/21/2020/2021 dated April 14, 2021 and September 22, 2021 respectively for the supply, delivery, installation, testing, commissioning, support and maintenance of the Kenya Integrated Elections Management System (KIEMS); and Hardware equipment and accessories by the 1st respondent is unconstitutional, unlawful and irregular for being in breach of articles 10, 81, 86 and 227 of the *Constitution* and the public procurement and elections laws made thereunder.



- c. Costs of this petition.

The 2nd Petitioner's Case:

20. The 2nd petitioner, Boaz Atanga Warugu's petition is dated October 29, 2021. It is supported by the petitioner's affidavit deposited to on even date.
21. It was his case that prior to and during the preparation and advertisement of the Kiems tender the Commission did not engage stakeholders as a mandatory requirement under article 10 of the Constitution and that it was also in violation of section 3 of the Procurement Act.
22. He further posited that the tendering process was opaque and that the 1st interested party had been adversely named in election related scandals around the world including Philippines and the United States of America.
23. On the aspect of preference margins, it was his case that the Kiems tender did not accord to article 227(2) of the Constitution which prescribes a framework within which policies relating to procurement and assets disposal that protects categories of persons or groups previously disadvantaged by unfair competition or discrimination.
24. He posited that the Kiems tender did not contain any verifiable evaluation criteria for all foreign tenderers participating in international tenders as required under section 157(9) of the Procurement Act.
25. The 2nd petitioner claimed that the Commission's failure to undertake public participation was deliberate and mischievous calculated at stifling competition and locking out local contractors in violation of the Constitution.
26. On the foregoing legal and factual basis, the 2nd petitioner prayed for the following reliefs: -
 1. A declaration that tender number IEBC/OIT/001/21/2020/2021 for the supply, delivery, installation, testing, commissioning, support and maintenance of the Kenya Integrated Elections Management System (KIEMS); and hardware equipment and accessories, related procurement proceedings and consequential decisions arising therefrom are unconstitutional, null and void;
 2. A declaration that tender number IEBC/OIT/002/21/2021/2022 for the supply and delivery of ballot papers; register of voters; statutory election result declaration forms to be used at the polling station; election and referendum result declaration forms to be used at the constituency, county and national tallying centre on a three-year framework contract, all related procurement proceedings and consequential decisions arising therefrom are unconstitutional, null and void.
 3. A declaration that all decisions for procurement of Supply, delivery, installation, testing, commissioning, support and maintenance of the Kenya Integrated Elections Management System (KIEMS); and hardware equipment and for the supply and delivery of ballot papers; register of voters; statutory election result declaration forms to be used at the polling station; election and referendum result declaration forms to be used at the constituency, county and national tallying centre made prior to are unconstitutional, null and void
 4. An order quashing tender number IEBC/OIT/001/21/2020/2021 for the supply, delivery, installation, testing, commissioning, support and maintenance of the Kenya Integrated



Elections Management System (KIEMS); and hardware equipment and accessories, related procurement proceedings and consequential decisions arising therefrom.

5. An order quashing tender number IEBC/OIT/002/21/2021/2022 for the Supply and Delivery of Ballot Papers; Register of Voters; statutory election result declaration forms to be used at the polling station; election and referendum result declaration forms to be used at the constituency, county and national tallying centre on a three-year framework contract, all related procurement proceedings and consequential decisions arising therefrom.
6. An order directing the respondent to re-issue the impugned tenders in strict compliance with the court's judgment, the Constitution and applicable laws.
7. Any other orders and or reliefs as the court may deem fit.
8. Costs of the petition.

The Petitioners' Submissions:

27. The 1st petitioner further urged its case through written submissions dated February 1, 2022.
28. It submitted that the judicial review case did not address the question whether there was violation of preferential margins hence propriety of the instant petition.
29. It was his case that it is the role of a constitutional court to enforce rights of the politically powerless and politically disenfranchised.
30. The foregoing position was buttressed by reliance on the decision in Okiya Omtatah v Central Bank of Kenya & 7 others [2018] eKLR where it was observed: -

..... where it is alleged that in awarding the tender the subject of the legal proceedings before the court, the relevant constitutional provisions were not adhered to, such contention if true may well justify the filing of a constitutional petition.
31. In rebuffing the contention that the petition was *res judicata*, it was submitted that the petitioners were not parties before the Review Board and that members of the public could not participate in the Review Board. It was his case that petitioners could only file a constitutional petition for reprieve.
32. Support of the foregoing position was placed on the decision in Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others [2017] eKLR where it was held as follows: -

...In my view a person who feels that a public procurement does not meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness under article 227 of the Constitution, and who has no other recourse known to law, as the IEBC concedes the applicant does not have, must in my view find recourse in the High Court.

...In my view, to bar a person from carrying out his constitutional obligation and mandate of upholding and defending the Constitution would amount to abdication by this court of one of its core mandate under article 165(2)(d) of the Constitution.
33. The 2nd petitioner filed written submissions dated February 8, 2022. He submitted that the tenders were prepared, awarded and executed in clear derogation of public participation and the obligation to provide reference margins.



34. In challenging the claim that the petitions were barred by *res judicata*, it was his case that the doctrine applies to constitutional petitions sparingly and in the clearest of circumstances. He stated that none of the elements that trigger the application of the doctrine of *res judicata* were present.
35. To buttress the foregoing, reliance was placed on the decision in *Okiya Omtatah Okoiti & another v The Attorney General and another* Petition No 593 of 2013 [2014] eKLR where it was observed: -
- the principle of *res judicata* can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the constitutional court and where the court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.
36. It was pointed out that the issues in the petition were different from those before the Review Board, and even if they were similar, the judgment was not on merit and did not deal with the jurisdictional aspect.
37. It was his case that the petition raised constitutional issues and there was no other forum apart from this Court that the Petitioner would get recourse. Reference was made to the Court of Appeal decision in *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 others* [2017] eKLR, where the learned judges observed that the Review Board was not the appropriate forum to raise issues relating to constitutional interpretations of procurement of election materials.
38. Submitting on importance of public participation for procurement of election materials for general elections, counsel emphasised the Court of Appeal decision in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR, on the provision of article 221 and section 21 of the *IEBC Act*. In the case, the learned judges observed thus: -
- "165. What is critical is a reasonable notice and reasonable opportunity for public participation. In determining what is reasonable notice, a realistic time frame for public participation should be given. In addition, the purposes and level of public participation should be indicated. Reasonableness is also to be determined from the nature and importance of legislation or decision to be made, and the intensity of the impact of the legislation or decision on the public."
39. It was his case that all processes by the IEBC are subject to legal sanctity which if violated can form a basis for nullification. He referred to the foregoing Court of Appeal case where the learned judges observed as follows that: -
- All the processes leading to the elections are subject of scrutiny and may well be grounds for nullification of elections. Therefore, to avoid such an eventuality, the preparations leading to the elections must meet the minimum standards articulated in article 81 of the *Constitution* that election system must be free and fair; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. In addition, article 86 of the *Constitution* enjoins the IEBC to ensure that whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.
40. In adding his voice on the necessity to provide preference margins for open international tenders, he stated that it is a constitutional obligation according to article 227(2)(a) of the *Constitution* and section



76 of the Procurement Act to provide for preference margins in the tender document in clear and unequivocal terms in order to encourage and promote local participation.

41. It was his case that the need for margins is to promote local goods and services. He claimed that the tender was unconstitutional as far as the preferential margins were contravened and there was no evidence to the contrary.
42. In laying emphasis to the foregoing, the 2nd petitioner relied on the decision in Republic v Public Procurement Administrative Review Board & 2 others Ex parte Niavana Agencies Limited; M/S Five Blocks Enterprises Ltd (Interested Party) [2021] eKLR where it was observed that: -

..... The idea behind preferences and reservations is, inter alia, to promote locally manufactured goods or locally available services; it is to promote local industry and, in other instances, to support those who are likely to be disadvantaged by unfair competition and discrimination. This concept is expressly acknowledged in article 227 of the Constitution.
43. In closing his case, she urged the court, in view of the short timelines until elections, to issue appropriate remedies one such being on government to government procurements.

The 1st Respondent's Case:

44. The Commission opposed the petition through grounds of opposition dated January 24, 2022 and the replying affidavit of Marjan Hussein Marjan, the Chief Executive Officer, deposed to on November 9, 2021.
45. In the grounds of opposition, it was its case that the petitions do not meet the threshold under article 165(4) of the Constitution as they do not raise any substantial questions of law worthy of this court's intervention.
46. It was further deposed that the matters raised by the petitioners were *res judicata* for having been heard and determined with finality by both a court of law and the Review Board.
47. The deponent stated that the matters raised in the petition relate to contractual disputes and do not directly or indirectly affect any substantial rights of the parties and neither do they raise any question of general public importance.
48. Mr Marjan deposed that the dispute raised herein is *res judicata* the decision in Review No 107 of 2021 where the Review Board determined the issues conclusively.
49. He further deposed that the issues raised in the instant petition were addressed in the judicial review case.
50. On a different line of argument, he deposed that the dispute before this court is *sub judice* the request for review before the Review Board in Review No 125, 130, 131 and 132 of 2021 for the procurement of election materials by unsuccessful bidders.
51. In sum, he stated that the Review Board has specialised jurisdiction under section 27 of the Procurement Act and all the issues raised by the petitioner fall within its exclusive jurisdiction. He urged this court not to usurp that mandate.
52. Mr Marjan further deposed that the petition was defective for failing to enjoin the successful bidders despite knowledge that they have proprietary interests and expectations arising out of the dispute.
53. He further faulted the timing of institution of the consolidated petition stating that the petitioners were guilty of laches and indolence. He deposed that the KIEMS tender was advertised on April 14,



2021 while the one for election material was advertised on July 15, 2021 and it is curious that the petitioners' grievances arose for the first time after the process of evaluation and award thereof was concluded.

54. He stated that it is inequitable for the petitioners not to have instituted the suit at the time of publication. To that end, he stated that they were guilty of laches and were caught up by the maxim, delay defeats equity and the one that states, equity aids the vigilant and not the indolent.
55. In urging that the Commission was in line with the preference margins set out under section 55 (1) of the *Procurement Act* and regulation 144 thereof, he stated that the tender documents had it as mandatory preliminary evaluation criteria.
56. He deposed that the successful bidders also submitted their respective local content plans in accordance with the tender documents.
57. In deposing that there was public participation it was his case that the process of procurement of election materials started in June 2021 where an election operation plan (EOP) was developed with all the stakeholder engagement. In the said process, public participation, involvement, compliance and accountability were taken into account.

The Submissions

58. The 1st respondent filed written submission dated November 16, 2021.
59. It reiterated that the consolidated petitions were *res judicata*.
60. To that end, it submitted that in Board Review No 107 of 2021 and Review No 117 of 2021, similar matters as in the instant dispute had been urged before the court where article 227 of the *Constitution* on public participation was at the heart of the dispute.
61. It was submitted that in judicial review case, the court revised the decision in the Review Board. It was, therefore, his case that the petition was *res-judicata* since the doctrine requires a party to raise all the issues that can be raised in one dispute.
62. Further, it was stated that it was out of tune that only High Court could handle constitutional issues because Tribunals can make an assessment of constitutional infractions as well.
63. As regards delay in instituting the suit, it was submitted that the KIEMS kit contract was advertised on July 14, 2021 together with its tender documents. It was its case that there is only three months to election and in view of the fact that the procurement takes at least 7 months to complete and that the contracts were of Kshs 10 billion and had already been executed, the petitioners had come to court late in the day.
64. It was further stated that procurement process is very deliberate on timelines and as such election plan has been on the in place for the last three years and no one has questioned it.
65. In respect to procurement, it submitted that the choice of procurement process was a matter of discretion of the procuring entity. It is not a constitutional question.
66. It was also submitted that all the details of the contract had been in the public domain for many years and the petitioners did not request for any information. It was his position that the IEBC had published and publicised all the processes transparently in accordance to tender documents.



67. On the aspect of preference of margins, it was submitted that the Commission had ensured that the local margins were given at the preliminary evaluation stage. He claimed that any tender without 40% of local content could not be considered.
68. On the foregoing basis, it submitted that the judicial review case was considered on merit basis and the instant case was not justiciable.
69. While urging the court to be guided by proportionality test in declining the orders sought, the Commission submitted that the interest of the country ought to take priority in order to avoid constitutional crisis. Reference was made to the decision in *IEBC v NASA & 3 others* (*supra*).

The 1st Interested Party's Case:

70. Smartmatic International Holding GV opposed the petition through grounds of opposition dated December 6, 2021 and the replying affidavit of Kevin Kibet Kiptoo, the Business Director Seamless Limited, the official local business partner of the 1st interested party, deposed to on November 16, 2021.
71. In the replying affidavit, Mr Kiptoo deposed that the petition does not set out with precision the constitutional provisions violated and there is no *prima facie* case deserving of the orders sought.
72. In stating that the petition was barred by exhaustion doctrine, the doctrine of res-judicata and sub-judice, he deposed that in Review No 107 of 2021, one of the issues that was before it was whether the tender documents were in violation of the Act that entitles local and or citizen contractors to preference when participating in an international competitive bid or at all.
73. He further reiterated that the Board set aside the award but upon appeal for the Judicial Review, the High Court quashed the Review Board's decision.
74. In the grounds of opposition, the 1st interested party restated the depositions as contained in the replying affidavit.

The 2nd Interested Party's Case:

75. The 2nd interested party, Inform Lykos (Hellas) S.A opposed the petition through the Replying Affidavit of Grekis Kostas, the Chief Commercial Officer, deposed to on November 19, 2021 and grounds of opposition dated March 18, 2022.
76. He deposed that the petition and the application were defective in law for by-passing Review Board's jurisdiction by couching the dispute as a constitutional one.
77. He associated himself with the deposition of the 1st respondent and the 1st interested party on the issue of *res judicata, sub judice* and stated that all challenges raised concerning the ballot printing tender are matters within the jurisdiction of the Review Board.
78. He deposed further that the public procurement process is time bound at review and appeal stages and subjecting the review of the tenders to constitutional challenge that are not time bound would unlawfully delay the constitutional and statutory timelines.
79. It was his case that the minutes of the pre-tender meeting indicate that the petitioner did not participate in them and as such has no justification for claiming that there was no avenue for him to raise the complaints raised here.
80. In the grounds of opposition, the 2nd interested party urged its case as in the replying affidavit of Grekis Kostas.



The Interested Parties' Submissions:

81. The 1st and 2nd interested parties filed joint written submissions dated March 21, 2022.
82. In giving a synopsis of how the events transpired the interested parties submitted that the 1st interested party participated in tender for supply of KIEMS kits alongside a Kenyan company.
83. Upon the 1st interested party being awarded tender, there was a Board Review for want of compliance with local contract plans and preference margins. Accordingly, the Review Board ordered the IEBC to re-tender.
84. It was submitted that the 1st interested party then instituted the judicial review case challenging the Board's decision where it was found that the Review Board had no jurisdiction to hear the applicant before it. It hence quashed the decision.
85. They submitted that at the time of quashing the decision of the Board the tender had not been awarded.
86. They further submitted that dissatisfied, they filed Civil Appeal No 008 of 2021 before the Court of Appeal seeking stay. It was their case that the appeal was struck out because at the time of filing the proceedings, the appeal had not been filed, heard or determined.
87. Subsequently, in absence of stay orders, the 1st interested party was awarded the contract and commenced implementation.
88. On the foregoing, it was submitted that the consolidated petitions were an attempt to relitigate the issues already determined as the issue of local plans and margins were part of the issue before the Review Board and the High Court.
89. They reiterated that the aspect of direct procurement as settled by the Court of Appeal in *IEBC v NASA & 6 others* (*supra*) do not apply and added that time was of essence in the instant dispute since adverse orders would be tantamount to adjourning the elections.
90. On behalf of the 2nd interested party, it was submitted that IEBC complied with the order from court to re-evaluate the tenders whereupon the 2nd interested party was awarded the tender. There was no dispute thereafter.
91. It was his submission that all processes were complied with and the Review Board was fully satisfied.
92. In the end, the court was urged to dismiss the consolidated petitions.

Analysis:

93. The analysis herein will comprise of several other issues in the event the court ascertains that its jurisdiction was properly invoked.
94. I will, therefore, begin this discussion with the jurisdictional issue.
95. The Court of Appeal in Nakuru Civil Appeal No 119 of 2017 *Public Service Commission & 2 others v Eric Cheruiyot & 16 others* consolidated with Civil Appeal No 139 of 2017 *County Government of Embu & another v Eric Cheruiyot & 15 others* [2022] eKLR, a decision rendered on February 8, 2022 aptly discussed the doctrine of jurisdiction as follows: -

"36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in "Words and Phrases Legally Defined", Volume 3 at page 113 defines court jurisdiction as follows:



By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

37. The *locus classicus* on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1. Nyarangi, JA relying, *inter alia*, on the above cited treatise by John Beecroft Saunders held as follows:
- ...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.
39. The Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No 2 of 2011 held that jurisdiction of courts in Kenya is regulated by the *Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:
- ...a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.
40. In *Samuel Kamau Macharia and another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No 2 of 2011, the Supreme Court reiterated its holding on a court's jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:
- (68). A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law."
96. The Supreme Court in *Petition No 7 of 2013 Mary Wambui Munene v Peter Gichuki Kingara & 6 others*, [2014] eKLR, stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.
97. The way the jurisdictional issue was raised in this matter call for the examination of the applicability of the doctrine of exhaustion. In the event this court finds that the doctrine is inapplicable in the



circumstances of this case, then it will consider whether the consolidated Petitions are barred by the doctrines of *res judicata* and *sub judice*.

98. I will now look at what the doctrine of exhaustion entails.

99. The doctrine of exhaustion in Kenya traces its origin from article 159(2)(c) of the [Constitution](#) which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

159(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

- (a) ...
- (b) ...
- (c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

100. Clause 3 is on traditional dispute resolution mechanisms.

101. The doctrine of exhaustion was comprehensively dealt with by a 5-judge bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 [William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others \(Interested Parties\)](#) [2020] eKLR. The court stated as follows:

"52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This encourages alternative dispute resolution mechanisms in line with article 159 of the [Constitution](#) and was aptly elucidated by the High Court in R v Independent Electoral and Boundaries Commission (IEBC) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the [Constitution](#) or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the [Constitution of Kenya 2010](#) was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the constitutional rationale and basis for the doctrine. This is Geoffrey Muthiga Kabiru



& 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The ex parte applicants argue that this accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution."

102. The court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

"59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R v Independent Electoral and Boundaries Commission (IEBC) & others ex parte The National Super Alliance Kenya (NASA) (*supra*), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 others v Aelous (K) Ltd and 9 others.)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
61. The second principle is that the jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo, J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.
62. In the instant case, the petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in bill of rights



language as a pretext to gain entry to the court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

103. The above decision was appealed against by the respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No 166 of 2018 *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] eKLR held as follows: -

"The jurisdiction of the High Court is derived from article 165 (3) and (6) of the *Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the *Constitution* encompassing determination of any matter relating to the constitutional relationship between the different levels of government.

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of the *Constitution* and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola, J. They also took into account the doctrine of exhaustion as enunciated in Republic v Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under article 165 (5) of the *Constitution* became automatic. And in our view, it could not be ousted or substituted."

104. Further, in Civil Appeal No 158 of 2017, *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR, the learned judges of the Court of Appeal relied on an earlier decision in Speaker of National Assembly v Njenga Karume [1990-1994] EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of law are enjoined to defer to specialised Tribunals and other alternative dispute resolution statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the *Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.



105. Having had a glimpse on the doctrine, the next consideration is whether the petitioners had audience before the Public Procurement Administrative Review Board (hereinafter referred to as ‘the Review Board’).

106. For ease of this discussion, I will reproduce part XV of the Act, and as under: -

Part XV – Administrative review of procurement and disposal proceedings

167. Request for a review

- (1) Subject to the provisions of this part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.
- (2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.
- (3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.
- (4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—
 - (a) the choice of a procurement method;
 - (b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and
 - (c) where a contract is signed in accordance with section 135 of this Act.

168. Notification of review and suspension of proceedings

Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed.

169. Rejection of requests by Review Board Secretariat

The Review Board Secretariat shall reject a request for a review where no appeal fees were paid within the prescribed time.

170. Parties to review-

The parties to a review shall be—

- (a) the person who requested the review;



- (b) the accounting officer of a procuring entity;
- (c) the tenderer notified as successful by the procuring entity; and
- (d) such other persons as the Review Board may determine.

171. Completion of review

- (1) The Review Board shall complete its review within twenty one days after receiving the request for the review.
- (2) In no case shall any appeal under this Act stay or delay the procurement process beyond the time stipulated in this Act or the Regulations made thereunder.

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
- (e) order termination of the procurement process and commencement of a new procurement process.

174. Right to review is additional right

The right to request a review under this Part is in addition to any other legal remedy a person may have.

175. Right to judicial review to procurement

- (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.



- (2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.
- (3) The High Court shall determine the judicial review application within forty- five days after such application.
- (4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.
- (5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.
- (6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.
- (7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.

107. There is no doubt that the foregoing part XV of the *Procurement Act* deals with dispute resolution mechanisms.

108. The preamble to the *Procurement Act* describes it as follows: -

An Act of Parliament to give effect to article 227 of the *Constitution*; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes

109. Article 227 of the *Constitution* provides as under: -

Procurement of public goods and services

- (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.
- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—
 - (a) categories of preference in the allocation of contracts;
 - (b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
 - (c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and



- (d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.

110. Section 3 of the Procurement Act provides the values and principles that ought to guide public procurement and asset disposal. The provision states as follows: -

3. Guiding principles

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

- (a) the national values and principles provided for under article 10;
- (b) the equality and freedom from discrimination provided for under Article 27;
- (c) affirmative action programmes provided for under articles 55 and 56;
- (d) principles of integrity under the Leadership and Integrity Act, 2012 (No 19 of 2012);
- (e) the principles of public finance under Article 201;
- (f) the values and principles of public service as provided for under Article 232;
- (g) principles governing the procurement profession, international norms;
- (h) maximisation of value for money;
- (i) promotion of local industry, sustainable development and protection of the environment; and
- (j) promotion of citizen contractors.

111. It is, therefore, apparent that the Procurement Act fuses the relevant aspects of the Constitution such that whenever the Procurement Act is applied, that can only be within the confines of the Constitution. It also means that the Review Board, being a creature of the Procurement Act must, in discharging its mandate, uphold and defend the Constitution and the law. Of course that calling is expressly so provided for in Article 3 of the Constitution to the extent that every person, as defined in article 260 of the Constitution, has an obligation to respect, uphold and defend the Constitution.

112. Putting it more succinctly, the Review Board has the jurisdiction to determine whether the Constitution and the law were violated by a procuring public entity in respect to public procurement and assets disposal proceedings.

113. This court, therefore, takes great exception to the position that tribunals, quasi-judicial bodies, State organs or any person, except courts of law, cannot determine whether the Constitution and the law is infringed. That cannot, by any shred of imagination, be correct. The reason is simple. Article 3 of the Constitution and in mandatory terms, obligates every person, as defined in article 260 of the Constitution, to respect, uphold and defend the Constitution.

114. Further, the people of Kenya expressly demanded that the Constitution applies to and be applied by the current and future generations. In its Preamble the Constitution states as follows: -

"We, the people of Kenya-

Acknowledging

Honouring



Proud

Respectful

Committed

Recognising

Exercising

Adopt, enact and give this Constitution to ourselves and to our future generations."

115. In discharging the said constitutional-calling, the persons, which include tribunals and quasi-judicial bodies, must apply the Constitution and the law. A body which applies the Constitution and the law definitely has the capacity to understand and ascertain whether the very Constitution and law it is supposed to uphold is infringed. That can be the only reasonable rationale since the converse is to suggest that the persons do not understand and cannot therefore respect, uphold and defend the Constitution and the law. Such a finding will be in itself unconstitutional.
116. It is, hence, the finding and holding of this court, that the Review Board has unfettered jurisdiction to determine whether the Constitution and the law is infringed in procurement and disposal proceedings by public entities.
117. Having so found, I return to the germane question as to whether the petitioners had audience before the Review Board.
118. Section 170 of the Procurement Act provides for the parties to a review. The parties are as follows: -
 - (a) the person who requested the review;
 - (b) the accounting officer of a procuring entity;
 - (c) the tenderer notified as successful by the procuring entity; and
 - (d) such other persons as the Review Board may determine.
119. There is no doubt that the petitioners did not fall within the first three categories of the parties. That is because the petitioners were not persons who requested for the review neither were they the accounting officers of the Commission and nor were they the tenderers notified as successful by the Commission. The petitioners are public-spirited Kenyans desirous of defending the Constitution and public interest.
120. Could the petitioners be falling within the last category of the parties to a review under section 170 of the Procurement Act? That category is 'such other persons as the Review Board may determine'.
121. In order to appreciate all those who have access to the Review Board under the Procurement Act, part XV thereof ought to be read holistically. The provision must be read conjunctively as opposed to disjunctively. I say so because there is a danger of limiting those having access to the Review Board to the two category of persons named in section 167(1) of the Procurement Act who are a candidate or a tenderer.
122. A reading of section 170 of the Procurement Act introduces two other categories of person with access to the Review Board. They are the accounting officer of the procuring entity and such other persons as the Review Board may determine.
123. As it has been demonstrated above that the Review Board has powers to determine whether the Constitution and the law is infringed, then the first port of call whenever a party is challenging a



- procurement or a disposal process by a public entity on the basis of the Constitution and the law is the Review Board.
124. The only exception to the foregoing requirement is when a party demonstrates that any of the exceptions to the doctrine of exhaustion apply to a matter or the party is not among those contemplated in sections 167(1) and 170 of the Procurement Act. It is only in such instances that the Review Board will lack jurisdiction.
 125. There is, therefore, the need to ascertain if the petitioners in this case fall under the persons contemplated under the category of ‘such other persons as the Review Board may determine’.
 126. In order to understand the context in which the term “such other persons as the Review Board may determine’ is used in section 170 of the Procurement Act, there is need to look at one of the rules of interpretation. That is the *ejusdem generis* rule.
 127. The *ejusdem generis* rule is an interpretational principle in law. It is a rule of construction that guides court in reconciling any incompatibility between specific and general words.
 128. *Stroud’s Judicial Dictionary* 3rd edition, defines the principle as follows:

"Where a statute, or other document, enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces ‘other’ persons or things – the word ‘other’ will generally be read as ‘other such like’, so that the persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior to, or different from, those specifically enumerated."
 129. The *Black’s Law Dictionary*, Garner A Bryan, 9th edition, Thomson Reuters 2009 at page 594 defines the doctrine in the following manner: -

A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items on the same class as those listed. For example, in the phrase horses, cattle, sheep, pigs, goats, or any other farm animals, the general language or any other farm animals – despite its seeming breadth– would probably be held to include only four-legged, hooved mammals typically found on farms, and thus would exclude chickens.
 130. Therefore, where general words follow specific words in an enumeration describing the legal subject, *ejusdem generis* principle requires that the general words are construed to embrace only objects similar in nature to those enumerated by the preceding specific words.
 131. The rule, therefore, accomplishes the purpose of giving effect to both the specific and the general words by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words.
 132. In his treatise titled *Sutherland Statutory Construction* 3rd edition, 1984, Horrack Sutherland states at paragraph 4910 that for the doctrine to apply, the following conditions must exist: -
 - i. That statute contains an enumeration by specific words;
 - ii. The members of the enumeration constitute a class;
 - iii. The class is not exhausted by the enumeration;
 - iv. A general term follows the enumeration; and



- v. There is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.
133. The Court of Appeal in Nairobi Civil Appeal 351 of 2012 *Commissioner for the Implementation of the Constitution v Attorney General & 2 others* [2013] eKLR clearly brought out the application of the doctrine. Before it was the question whether ‘the marginalized’ fell within the category of persons named in article 97(1)(c) of the *Constitution*. The said article is in respect of Membership of the National Assembly and states as follows: -
- "97. (1) The National Assembly consists of-
- (c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers;..."

134. The learned judges of Appeal spoke to *ejusdem generis* in reference to the High Court decision in *Rangal Lemeguran & others v Attorney General & others* [2006] eKLR, where in interpreting the term special interests the High Court observed as follows: -

Although the *Constitution* does not define special interests contemplated by section 33(1) [of the former Constitution] they include those interests which have not been taken care of by the election process and which are vital to the effectiveness of the democratic elections in terms of adequate representation for all-in a democracy. In other words, the special interests mean those interests which the normal electioneering process has failed to capture and represent.

135. The judges then agreed with the proposition that ‘the marginalized’ fell into the group anticipated by the article 97(1)(c) of the *Constitution*. The judges had the following to say on the doctrine: -

"... there are some clear categories of people that qualify to be viewed as representing special interests, namely:

- i. ethnic minorities
- ii. the youth;
- iii. the blind;
- iv. the deaf;
- v. the physically disabled.

We can on our part add that religious minorities, linguistic or cultural minorities and racial minorities fall seamlessly into the category of special interests while the *Constitution* has also in the wisdom of the framers and the people of Kenya made inclusion of “workers” as a special interest group.

From what we have said so far, it should be obvious that for a class of persons to qualify to be called a special interest worthy of special representation under our constitutional framework, they must be a class as can fairly be said to have suffered marginalization and disadvantage keeping them away from the centre of the political process. That, to us, is the logical, rational nexus that at once attracts and glues such a class into proper location in both section 34(9) of the *Elections Act* and article 97(1) (c) of the *Constitution*.



That being our view of the matter, we agree with the appellant that an interpretation of article 97(1)(c) of the Constitution invites the application of the *ejusdem generis* rule. The youth, persons with disabilities and workers clearly fall in the category of the marginalized, the disadvantaged and the vulnerable-those not sufficiently empowered to muscle their way, generally speaking, into the inner sanctums of political and state power. They are the natural underdogs in the rough and tumble of the political jungle more likely than not to be elbowed out of the centre and off the field unless special affirmative and protective measures be taken to aid them."

136. From the foregoing, the category of persons contemplated as 'such other persons as the Review Board may determine', in section 170 of the Act could only mean such persons who have an identifiable interest or stake in the procurement or disposal process. I say so because if a person has no meaningful interest or stake in a procurement or disposal process, then such a person has no business appearing before the Review Board.
137. A person considering himself, herself or itself, as having identifiable interest or stake in a procurement or disposal process and who is not among the person who requested for the review, or is not the accounting officer of the procuring entity and is not the tenderer notified as successful by the procuring entity, has the right to seek audience and demonstrate its interest before the Review Board. It, however, remains the discretion of the Review Board to either allow such a person to participate in the proceedings before it or not.
138. In making the decision as to whether a party may be allowed to take part in the review, the Review Board will consider, among other issues, whether any of the exceptions to the doctrine of exhaustion apply in respect of the party's interest.
139. The impugned procurements in these proceedings were advertised in print and electronic media. That was in line with the Commission's calendar. Sealed bids for the tender were invited. That fact was acknowledged in the judgment in judicial review case where the learned judge stated as follows: -

In my humble view, assuming there was any breach of the provisions of either the Constitution or the Public Procurement and Asset Disposal Act in the tender document, it occurred as early as April 14, 2021 when the procuring entity placed an advertisement in the print and electronic media inviting sealed bids for the tender.
140. There is no finding that the learned judge's foregoing holding was set-aside. As such, this court, as well, finds that the impugned procurements in the current proceedings were accordingly advertised.
141. In these proceedings, the 1st petitioner sought the following reliefs:
 - a. A declaration that the tendering process for the entire tender proceeding No IEBC / OIT/001/21/2020/2021 and No IEBC/OIT/001/21/2021/2022 dated April 14, 2021 and September 22, 2021 respectively for the supply, delivery, installation, testing, commissioning, support and maintenance of the Kenya Integrated Elections Management System (KIEMS); and hardware equipment and accessories by the 1st respondent is unconstitutional, unlawful and irregular for being in breach of articles 10, 81, 86 and 227 of the Constitution and the public procurement and elections laws made thereunder.
 - b. A nullification of the entire Tender proceeding No IEBC /OIT/001/21/2020/2021 and No IEBC/OIT/001/21/2020/2021 dated April 14, 2021 and September 22, 2021 respectively for the supply, delivery, installation, testing, commissioning, support and maintenance of the Kenya Integrated Elections Management System (KIEMS); and hardware equipment and



accessories by the 1st respondent is unconstitutional, unlawful and irregular for being in breach of articles 10, 81, 86 and 227 of the Constitution and the public procurement and elections laws made thereunder.

c. Costs of this petition.

142. The 2nd petitioner craved for the following remedies: -

1. A declaration that tender number IEBC/OIT/001/21/2020/2021 for the supply, delivery, installation, testing, commissioning, support and maintenance of the Kenya Integrated Elections Management System (KIEMS); and hardware equipment and accessories, related procurement proceedings and consequential decisions arising therefrom are unconstitutional, null and void;
2. A declaration that tender number IEBC/OIT/002/21/2021/2022 for the supply and delivery of ballot papers; register of voters; statutory election result declaration forms to be used at the polling station; election and referendum result declaration forms to be used at the constituency, county and national tallying centre on a three-year framework contract, all related procurement proceedings and consequential decisions arising therefrom are unconstitutional, null and void.
3. A declaration that all decisions for procurement of supply, delivery, installation, testing, commissioning, support and maintenance of the Kenya Integrated Elections Management System (KIEMS); and Hardware Equipment and for the supply and delivery of ballot papers; register of voters; statutory election result declaration forms to be used at the polling station; election and referendum result declaration forms to be used at the constituency, county and national tallying centre made prior to are unconstitutional, null and void.
4. An order quashing tender number IEBC/OIT/001/21/2020/2021 for the supply, delivery, installation, testing, commissioning, support and maintenance of the Kenya Integrated Elections Management System (KIEMS); and Hardware Equipment and Accessories, related procurement proceedings and consequential decisions arising therefrom.
5. An order quashing tender number IEBC/OIT/002/21/2021/2022 for the supply and delivery of ballot papers; register of voters; statutory election result declaration forms to be used at the polling station; election and referendum result declaration forms to be used at the constituency, county and national tallying centre on a three-year framework contract, all related procurement proceedings and consequential decisions arising therefrom.
6. An order directing the respondent to re-issue the impugned tenders in strict compliance with the court's judgment, the Constitution and applicable laws.
7. Any other orders and or reliefs as the court may deem fit.
8. Costs of the petition.

143. The petitioners were, therefore, interested in the outcome of the procurement process. They are concerned public spirited litigants out to ensure that the procurements by the Commission were in line with the Constitution and the law. To that end, the petitioners have identifiable interests in the procurement processes.

144. Having found that the petitioners had identifiable interests in the impugned Procurement processes, then they squarely fell within the category of persons contemplated in Section 170(d) of the Procurement Act being 'such other persons as the Review Board may determine.' Therefore, the



- petitioners had the right of audience before the Review Board unless the exceptions to the doctrine of exhaustion apply.
145. Under section 173 of the *Procurement Act*, the Review Board has wide powers when dealing with any request for review. For instance, the Board may annul anything the accounting officer of a procuring entity has done in the procurement or disposal proceedings, including annulling the procurement or disposal proceedings in their entirety; give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings or it may substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings.
 146. The Review Board may also order the payment of costs as between parties to the review in accordance with the scale as prescribed and may also order termination of the procurement process and commencement of a new procurement process.
 147. Looking at the prayers sought in the consolidated petitions and the remedies which the Review Board may grant upon handling a request for review, there is no doubt that it is within the Review Board's jurisdiction to grant any of the prayers sought in the consolidated petitions once a request for review is successful.
 148. The *Procurement Act* further provides for elaborate appellate avenues in the event a party is dissatisfied with the outcome of the Review Board in handling a request for review.
 149. Having said so, it is the finding and holding of this court that the current disputes could have been competently lodged before the Review Board since all the remedies sought by the petitioners in the current proceedings were all available before the Review Board.
 150. The above discussion, hence, disposes of one of the exceptions to the exhaustion doctrine. That is because the petitioners had adequate audience before the Review Board as created by a statute, and more so, they would be accorded the quality of audience which is proportionate to the interests they wished to advance in these petitions.
 151. The other exception is when it is proved that the alternative dispute resolution mechanism, in this case, the Review Board, will not serve the values enshrined in the *Constitution* or the law. There has been no contention to that end or at all by any of the petitioners.
 152. What this court has already found is that the Review Board, while discharging its mandate, is like a caged animal. The animal can move, but within the cage. The cage in this case is the *Constitution* and the law. Of emphasis is the legal position that the Review Board has powers to apply and determine whether certain procurement or disposal proceedings were in compliance with the *Constitution* and the law.
 153. In this matter, it is apparent that the other exception to the doctrine of exhaustion does not also apply.
 154. Having found that the petitioners were bound by the doctrine of exhaustion to plead their cases before the Review Board, I must, at this point deal with the submission by the 2nd petitioner that the Court of Appeal in the *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 others* [2017] eKLR and in other decisions held that where a party pleads issues that verge on constitutional interpretation especially where an important constitutional value is at stake, then the Review Board will not be the appropriate forum for such a dispute.
 155. This court wholly and respectfully agrees with the Court of Appeal on the position. The Court of Appeal was clear that if the dispute verges on constitutional interpretation then the Review Board



lacked jurisdiction. That is true and in line with article 165(3)(d) of the Constitution. The position in the current proceedings is different in that the petitioners have not placed for determination any question respecting the interpretation of the Constitution under article 165(3)(d). The consolidated Petitions simply call upon this court to find whether the procurement processes were in line with the Constitution and the law. That is a jurisdiction perfectly within the Review Board. As a result, the position taken by the Court of Appeal which this court fully agrees with is distinguishable in the current proceedings.

156. In fact, what the Court of Appeal was, in other words saying, was that the doctrine of exhaustion does not apply in matters calling for constitutional interpretation under article 165(3)(d) of the Constitution. Such matters pass the exemption to the exhaustion doctrine and the Review Board cannot exercise any jurisdiction over the same. Further, the Review Board has no powers to interpret the Constitution under article 165(3)(d) of the Constitution, but only the High Court.

157. My attention was also drawn to a paragraph in the judgment in the judicial review case where the learned judge stated as follows:

It does not necessarily follow that a public spirited litigant cannot obtain the tender document and institute proceedings, at any stage of the procurement process, in public interest if, say the Constitution has been violated or is threatened with violation. Such proceedings will not, however, be instituted before the Public Procurement Administrative Review Board but before a court of competent jurisdiction.....

158. The decision is also distinguishable in that the Learned Judge did not address himself to the exceptions to the doctrine of exhaustion. Further, the decision was limited to the parties to a review in section 167(1) of the Procurement Act and did not deal with section 170 of the Act.

159. As I come to the end of this discussion, it is imperative to remind ourselves that article 159(2)(c) of the Constitution vouches for alternative modes of dispute resolution. To that end, the Constitution and Parliament have created many entities with powers to handle specific and specialized disputes.

160. It is a well settled principle in law that where the Constitution or a statute has prescribed an alternative mode of resolution of disputes, the such mode must be strictly adhered to. The only exception should be instances where it is sufficiently demonstrated that the alternative modes are inept.

161. In this case, the Review Board is a specialized entity. It is comprised of advocates, arbitrators, procurement experts, accountants, engineers and architects. In fact, under section 29(1)(a) of the Procurement Act, the Chairperson must possess qualifications and experience as that of a judge of the High Court. With such a carefully chosen composition, the Review Board may be more expertly endowed than the contemporary courts in matters procurement and disposal in public entities.

162. To, therefore, contend that such a body whose Chairperson is one with qualifications and experience equivalent to a judge of the High Court cannot determine if the Constitution and the law is properly or otherwise complied with in a given set of circumstances, is not only unimaginable, but tantamount to opening a floodgate to litigants pouring out all manner of matters which call for special expertise into the courts. It also leads to defeating the very purpose in article 159 of the Constitution.

163. In sum, courts must remain vigilant and alive to the wider doctrine of non-justiciability which doctrine ought to be applied in appropriate cases.

164. Coming back to the case and deriving from the various foregoing findings, this court finds and hold that its jurisdiction over the disputes in the consolidated Petition was improperly invoked.



165. And, in the words of my Lordship Nyarangi, JA in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1

"... Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....",

this matter has to come to an end.

166. Consequently, the consolidated petitions are hereby determined as follows: -

- a. Petition No E488 of 2021 Stephen Mosei Mirambo v Independent Electoral and Boundaries Commission & Hon Attorney General and Smartmatic International Holdings BV (Interested Party) and Petition No E465 of 2021 Boaz Atanga Waruku v Independent Electoral and Boundaries Commission and Smartmatic International Holdings BV and Inform Lykos (Hellas) SA (Interested Parties) be and are hereby struck out for want of the court's jurisdiction on account of the doctrine of exhaustion.
- b. As parties sought for costs against the other, the petitioners shall shoulder the costs of the consolidated petitions.

167. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF MAY, 2022.

AC MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr Mituga, learned counsel for the 1st petitioner.

Miss Kituku, learned counsel for the 2nd petitioner.

Dr Mutubwa, learned counsel for the 1st respondent.

Dr O'Kubasu, learned counsel for the interested parties.

Jared Otieno – Court Assistant.

